IN THE

Supreme Court of the United States

October Term, 1975

No. 75-831

J. H. TULLY, Jr., ET. AL., *Appellant*

vs.

GRIFFIN, IN *Appellee*

APPELLEE'S MOTION TO DISMISS OR AFFIRM
AND
BRIEF IN SUPPORT THEREOF

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MOTION TO DISMISS OR AFFIRM

COMES NOW Griffin, Inc., Appellee herein, and moves the Court to dismiss this appeal, pursuant to Rule 16.1(a) of the rules of this Court, on the grounds that the appeal is not within the jurisdiction of this Court, because of the failure of appellants to conform to Rules 15.1(f) and 15.1(g);

And in the alternative, appellee moves the Court to affirm the order of the district court, pursuant to Rule 16.1(c) of the rules of this Court, on the grounds that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellee (plaintiff below), a Vermont corporation, brought this action to challenge appellants' contention that appellee is required to collect New York sales and use taxes on certain goods sold by it to residents of New York at appellee's place of business in Arlington, Vermont. The complaint, which sought declaratory and permanent injunctive relief, alleged that the imposition of such taxes on appellee would violate the Commerce, Due Process and Equal Protection Clauses of the United States Constitution. Initially, no preliminary relief was requested.

Appellants moved to dismiss the complaint, on the grounds that the district court had no jurisdiction because of 28 U.S.C. 1341.[1] Five days after moving to dismiss, appellants issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due," in the amount of $218,085.37. By its terms this notice provided that, unless a request for hearing was filed with the State Tax Commission within ninety days, the determination would become final.

In order to stay the running of that appeal period, appellee then moved for a preliminary injunction. A consolidated hearing was held before a three-judge court on August 1, 1975, on appellants' motion to dismiss and appellee's motion for preliminary relief. Since the tax appeal period would have expired within several days of that hearing, appellants, at the request of the court,[2]

[1] 28 U.S.C.S 1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

[2] "JUDGE COFFRIN: Could they withdraw the assessment with the understanding that they could later file the same assessment, or a later assessment or another assessment and start another ninety day period couldn't they?" Transcript of hearing, August 1, 1975, p. 39.

cancelled the assessment and issued a replacement in the amount of $298,580.59 on August 8, 1975.[3]

By order of October 20, 1975, the district court denied the motion to dismiss, enjoined any attempts to collect the tax, and ordered the revocation of the August 8, 1975 assessment notice. It is this order that appellants seek to have reviewed by the Supreme Court.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT IS WITHOUT JURISDICTION, AS A RESULT OF THE FAILURE OF APPELLANTS TO COMPLY WITH RULES 15.1(f) and 15.1(g) OF THE RULES OF THIS COURT.

Rule 15 of the rules of this Court sets forth the requisites for the statement as to jurisdiction required as part of the Rule 13 procedure for docketing cases. Subsection 1(f) of Rule 15 requires, in the case of an appeal from a federal court, a "...statement of the reasons why the questions presented are so substantial as to require plenary consideration...." No such statement appears in the Jurisdictional Statement for Appellants submitted herein. Subsection 1(g) of Rule 15 requires, in the case of an appeal from an order granting a preliminary injunction, a "...showing of the matters in which it is contended that the court has abused its discretion by such action." Appellants' jurisdictional statement contains no such showing.

In the absence of a claim of abuse of discretion, there is nothing for this Court to do in this case, for it has long been settled that the only inquiry in an appeal from an interlocutory injunction is whether the court below abused its discretion. *U.S. v. Corrick*, 298 U.S. 435, 437 (1936).

The appeal should be dismissed, because appellants have failed to comply with the requirements for conferring jurisdiction on this court.

[3] Opinion of the district court, October 20, 1975, fn. 2. Jurisdictional Statement for Appellants, p. 32 (hereafter cited as *Opinion.*)

II. THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED, BECAUSE IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Although it is the fact that the district court issued a preliminary injunction which permits an appeal at this time, appellants' jurisdictional statement is addressed not to the injunction, but to the denial of their motion to dismiss. Indeed, if dismissal is not required, there can be no doubt about the propriety of a temporary injunction designed to preserve for appellee important rights during the litigation, especially when that preservation can be accomplished at no cost to appellants.

28 U.S.C.§1341 does not absolutely forbid the grant of injunctions by federal courts in state tax cases. Rather, it requires an initial inquiry into the adequacy of the remedies available to challenge the exaction in the courts of the taxing state to determine whether the particular party in question has a remedy which is not "unduly burdensome." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

In this case, the district court, after hearing and extensive memoranda of law (including two on behalf of appellants), concluded that the remedies available to appellee in New York suffered from such infirmities as to take the case out of the prohibition of Section 1341. Those infirmities included the following:

1. The apparent lack of authority for the State Tax Commission to consider appellee's constitutional claims in the administrative hearing process, even aside from the dubious proposition of arguing such claims before the officials who are seeking to impose the tax, *Opinion*, p. 23;

2. The requirement, in order to obtain judicial review of a determination by the tax commission, that appellee pay the tax or post a bond in an amount greater than

appellee's total assets, *Opinion*, p. 24; *cf. Denton v. City of Carrollton*, 235 F. 2d 481 (5th Cir. 1956);

3. The requirement, as a precondition to the administrative review process, that appellee submit to an audit by an authority whose jurisdiction it contests, *Opinion*, p. 23; *cf. United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107 (S.D.N.Y. 1973);

4. Serious doubt as to the availability of a declaratory judgment proceeding in the state courts as an alternative to the administrative review process, *Opinion*, pp. 25-29; *cf. Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 (1944);

5. The apparent inability of New York courts to grant interlocutory relief, even assuming the availability of a declaratory judgment proceeding, *Opinion*, p. 28;

6. The possibility that, in utilizing any of the state remedies, appellee, whose contacts with New York State the district court found to be minimal, would waive any claim it had to be free of jurisdiction in New York, *Opinion*, fn. 10, p. 35; and,

7. The inherent difficulties in making appellee, a small corporation whose contacts with New York the district court found to be minimal, litigate in an unfamiliar forum, *Opinion*, p. 27.

The district court was well within the permissible boundaries of its discretion in denying the motion to dismiss, in view of its analysis of the relationship between appellee and the procedural avenues made available by New York.

The district court was likewise well within its permissible discretion in granting a preliminary injunction. What the court viewed as "extremely persuasive precedent" existed indicating a substantial likelihood that appellee would prevail on the merits. *Opinion*, p. 31. Further, the possibility that appellee would forever lose its right to challenge the amount of the

assessment if its constitutional challenge should fail constituted the plain spectre of irreparable injury to appellee. Finally, there is no hardship to appellant resulting from the injunction. This injunction does not interfere with a whole statutory scheme, but merely preserves the *status quo* as between these litigants during the pendency of the lawsuit.

CONCLUSION

The appeal should be dismissed, for the failure of appellants to conform to the requirements of Rule 15, or affirmed because there is no substantial question about the propriety of the actions of the district court.

Dated at Bennington, Vermont, January 9, 1976.

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